

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6134/36

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6134
No. 77-6136

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff-Appellee,

v.

CROWN COLONY COMMODITY OPTIONS, LTD.,
ALLEN M. GOLDSCHMIDT, ARNOLD TENNEY,
JOSEPH ALTER, JOEL STEINER,

Defendants-Appellants.

and

SAMUEL PATTERA, MARTIN DAVIDSON,
RONALD YALES,

Defendants.

On Appeal from an Order of the United States
District Court for the Southern District of New York

BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION,
APPELLEE

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On Appeal from an Order of the United States
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COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In an enforcement action brought by the Commodity Futures Trading Commission pursuant to Section 6c of the Commodity Exchange Act, in which (1) the Commission filed a complaint alleging that a commodity option firm, its owners and employees, have engaged in a course of fraudulent conduct calculated to cheat, defraud and deceive purchasers and prospective purchasers of commodity options and alleged no less than 16 specific misrepre-

sentations and omissions of material fact made in furtherance of the scheme, (2) defendants were provided, prior to an evidentiary hearing on the Commission's motion for a preliminary injunction, with the names of all Commission witnesses and all affidavits and exhibits filed in support of the motion, (3) an evidentiary hearing was held in which all defendants-appellants were represented by counsel who took an active role in the proceeding, and (4) the district court found, on the basis of substantially uncontroverted evidence, that the defendants had "knowingly and purposefully conducted a 'boiler room' operation calculated to sell as large a volume of options as possible to customers throughout the United States without regard to the suitability of the investment for customers, the soundness of the investment themselves, or the accuracy and completeness of representations made to induce purchases":

- a) did the detailed and specific allegations of fraud contained in the complaint satisfy the particularity requirements of Rule 9 of the Federal Rules of Civil Procedure;
- b) did the district court err in denying a motion for a continuance made by defendants-appellants on the morning of the evidentiary hearing or in failing to credit claims that one of the defendants had received inadequate notice of the hearing; and

- c) did the district court abuse its discretion in preliminarily enjoining the company, its two owners and the two persons who had managed the "boiler room" from further fraudulent sales of commodity options.

COUNTERSTATEMENT OF THE CASE

Preliminary Statement

These are appeals by Crown Colony Commodity Options, Ltd., a commodity options dealer, Allen M. Goldschmidt and Arnold Tenney, the co-owners of Crown Colony, and Joseph Alter and Joel Steiner, two brothers-in-law who operated Crown Colony's Miami, Florida, office, from an amended order filed on June 30, 1977, in the United States District Court for the Southern District of New York (per Weinfeld, J.), which preliminarily enjoins these appellants from further violation of the anti-fraud provisions of Rule 17 C.F.R. §32.9, adopted by the plaintiff Commodity Futures Trading Commission, pursuant to Section 4c(b) of the Commodity Exchange Act, 7 U.S.C. §6c(b)(1976).

The order was issued in an action instituted by the Commission on May 31, 1977, pursuant to Section 6c of the Act, 7 U.S.C. §13a-1(1976).

The Commission's complaint alleged (Complaint ¶¶13-23)^{1/} that the defendants had committed various violations of the Commodity Exchange Act, 7 U.S.C. §1 et seq., and the option regulations promulgated thereunder, including violations of the Commission's antifraud rule, 17 C.F.R. §32.9 (1977). By its complaint the Commission sought a temporary restraining order, preliminary and permanent injunctions, an accounting, disgorgement of illegal profits, and appointment of an equity receiver.

On June 6, 7 and 8, a hearing was held on the Commission's motion for preliminary injunction.^{2/} At that time Judge Weinfeld heard testimony^{3/} from seven witnesses in support of the Commission's request for relief. In addition, the Commission submitted to the court twenty-five affidavits and numerous exhibits that had previously been served upon appellants'

1/ The filing of the appendix to the briefs has been deferred pursuant to Fed. R. App. P. 30(c). References to the record on appeal are as follows: The transcript of the June 2, 1977 hearing is referred to as "June 2 Tr. ____". Transcript of the hearing of June 6, 7, 8, 1977 is referred to as "Tr. ____". Affidavits submitted to the Court are identified by name and paragraph and referred to as "Aff. ¶ ____".

2/ On June 2, 1977, Judge Weinfeld held a hearing on the Commission's request for a temporary restraining order, but deferred decision on that issue based upon a representation by counsel for Crown Colony that the firm was no longer actively offering and selling commodity options.

3/ On the suggestion of Judge Weinfeld (Tr. 168-169), the direct testimony of Messrs. Apostolakos and Hall, two Crown Colony customers, was confined to their testifying to the truth of their affidavits (Tr. 192-193; 425-426). Appellants then cross-examined those witnesses.

counsel. Counsel for appellants cross-examined the Commission's witnesses at length, but appellants did not testify themselves. The one defense witness they presented did not controvert the substance of the Commission's evidence.

On June 15, 1977, the district court issued an opinion, now reported at 434 F. Supp. 911, preliminarily finding that the defendants had collectively engaged in a broad scheme to defraud members of the public through a high-pressure pervasively-fraudulent telephone campaign to sell commodity options. On June 23, 1977, an order of preliminary injunction was filed in the court below. An amended order which was thereafter filed on June 30, 1977, is the subject of these appeals.

The Commission's Authority Under the Commodity Exchange Act

On October 23, 1974, in response to increasing public participation in the commodities markets and the proliferation of abuses in unregulated commodity transactions, Congress enacted the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389. That legislation extensively amended the Commodity Exchange Act, 7 U.S.C. §§1-17b (1970), and created the Commission as an independent regulatory agency. Since April 21, 1975, the Commission has been responsible for administering and enforcing the provisions of the Commodity Exchange Act, as amended.

In contrast to the regulation of commodity futures trading, which is the Commission's primary responsibility and has long been established under predecessor agencies,^{4/} prior to the 1974 amendments

^{4/} It is unlawful to effect a commodity futures transaction otherwise than by or through a member of a board of trade (i.e., commodity exchange) that has been designated by the Commission as a "contract market" for a specific commodity futures contract. Section 4 of the Commodity Exchange Act, 7

to the Commodity Exchange Act, the sale of commodity options was not subject to comprehensive regulation by any governmental agency in the United States.^{5/} To be sure, the Commodity Exchange Act had earlier prohibited option trading in specifically-enumerated commodities (see Section 4c(B), 7 U.S.C. §6c(B) (1970)).^{6/} But the Commodity Exchange Authority, which administered the Commodity Exchange Act before the Commission was created, had been without jurisdiction over options offered with respect to any other commodities. Nor did any other regulatory provision of state or federal law have even arguable

4/ [Footnote continued]

U.S.C. §6 (1976). For a board of trade to obtain designation as a contract market for a particular commodity futures contract, it must meet rigid requirements and must continue, after designation, to maintain specific standards, including enforcement of its rules and preventing manipulation and cornering of the market. See Sections 5 and 5a, 7 U.S.C. §§7, 7a (1976).

5/ A commodity option gives the purchaser the right, during a specified period of time, to buy ("call") and/or sell ("put") at a set price ("strike price") a specific futures contract or, in the case of an option on an actual commodity, a specific quantity of that commodity. In the case of so-called "London options" of the type offered by defendants here, the option relates to futures contracts on commodities traded on the London commodity markets. See British American Commodity Options Corp. v. Bagley, 552 F. 2d 482, 484-485 (2d Cir.), cert. denied, 98 S. Ct. 427 (1977).

6/ Those commodities were wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, onions, *Solanum tuberosum* (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice. 7 U.S.C. §2 (1970).

application to commodity option activities, except for statutes relating to the sale of securities. But those statutes had not been designed to deal with commodity options, and had consequently proven generally ineffective for the regulation of commodity option sales activities.^{7/}

Because of this regulatory gap, fraudulent business practices had developed, and scandals occurred in the late 1960's and early 1970's when numerous commodity option firms became insolvent or were otherwise unable to perform on option contracts. Thus, the House Committee on Agriculture reported that commodity option customers had been defrauded of millions of dollars after having been told that they were purchasing the "right" to buy or sell commodity futures contracts--^{8/} a right for which they had paid a premium. In order to close the

^{7/} See, e.g., Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess., pt. 1, at 224-225 (1974) (testimony of Tom Maher); *id.*, pt. 3, at 682-683 (testimony of Glenn Willet Clark) and 830-835 (Statement prepared by James Ryan and Richard Malm). Subsequently the courts sharply split on the question whether commodity options are securities under the federal securities laws. See, e.g., *Glazer v. National Commodity Research and Statistical Service, Inc.*, 547 F.2d 392 (7th Cir. 1977) in which it was recently held that commodity options are not securities as defined in the federal securities laws.

^{8/} H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 37-38 (1974); see also Hearings on H.R. 11955 before the House Committee on Agriculture, 93d Cong., 2d Sess., ser. 93-TT, at 181-182, 194-196 (1974); Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. pt. 1, at 224-225, pt. 3, at 682-683, 830-835 (1974) (testimony of Tom Maher and Glenn Willet Clark, and statement prepared by James Ryan and Richard Malm).

regulatory loophole concerning options, and thereby remedy these abuses, Congress, in amending the Commodity Exchange Act in 1974, sought fully

" . . . to regulate trading . . . in options relating to commodities or commodity futures, because such trading is now poorly regulated, if it is regulated at all" ^{9/}

For this purpose, Congress continued the existing ban on option trading with respect to the previously regulated commodities, ^{10/} and added a new section 4c(b), 7 U.S.C. §6c(b) (1976), vesting pervasive authority in the Commission to determine whether option transactions should be permitted with respect to any other commodities and, if so, under what conditions. ^{11/}

Pursuant to Section 4c(b), the Commission on June 24, 1975, promptly adopted a broad antifraud provision specifically applicable to commodity option sales. 17 C.F.R. §30.01 (1976), 40 Fed. Reg. 26505 (June 24, 1975). Subsequently, on November 22, 1976, the

^{9/} 120 Cong. Rec. H1027 (daily ed., October 9, 1974).

^{10/} See Section 4c(a)(B), 7 U.S.C. §6c(a)(B) (1976).

^{11/} Section 4c(b) provides in pertinent part:

"No person shall offer to enter into, enter into, or confirm the execution of, any [commodity option] transaction . . . contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe"

This provision is implemented through the Commission's general rulemaking authority contained in Section 8a(5) of the Act, 7 U.S.C. §12a(5) (1976). See British American Commodity Options Corp. v. Bagley, *supra*, 552 F.2d at 486.

Commission adopted interim rules comprehensively regulating the offer and sale of commodity options in the United States. 41 Fed. Reg. 51808, et. seq. (November 24, 1976), 17 C.F.R. Part 32 (1977).^{12/} At that time, the option antifraud rule was redesignated as Rule 32.9 in a slightly modified form, 17 C.F.R. §32.9 (1977).^{13/} It now provides:

"It shall be unlawful for any person directly or indirectly--

- (a) To cheat or defraud or attempt to cheat or defraud any other person;
- (b) To make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof;
- (c) To deceive or attempt to deceive any other person by any means whatsoever;

in or in connection with an offer to enter into, the entry into, or the confirmation of the execution of, any commodity option transaction."

Counterstatement of the Facts

Crown Colony is a New York corporation formed on or about February 1, 1976 (Tr. 418) by appellants Allen M. Goldschmidt and Arnold Tenney (Tr.

12/ The validity of the Commission's option regulations, which imposed registration, disclosure, minimum financial, book and recordkeeping, inspection and segregation of funds requirements upon persons engaged in the business of selling commodity options, was generally upheld by this Court in British American Commodity Options Corp. v. Bagley, supra, 552 F.2d 482. Some of the Commission's option regulations, however, including the antifraud rule, were not challenged in that action.

13/ At the time of its adoption, the Commission noted that Rule 32.9 was "the same rule" as 17 C.F.R. §30.01 (1976) and that the redesignation "is technical only and will have no substantive effect on fraudulent activity prior to, on, or after the effective date of §32.9." 41 Fed. Reg. 51813 (November 24, 1976).

262, 418). Mr. Goldschmidt is Crown Colony's president and owns fifty percent of its stock (Tr. 418). Mr. Tenney owns the other fifty percent of Crown Colony's stock and is also a director of the company (Tr. 418). Appellant Joseph Alter, Mr. Tenney's cousin (Tr. 262), and appellant Joel Steiner, Mr. Alter's brother-in-law, ran Crown Colony's Miami, Florida, office (Tr. 311).^{14/}

The essentially uncontroverted evidence adduced in the court below demonstrated, as Judge Weinfeld found, that Crown Colony engaged in the offer and sale of London commodity options to customers across the country through a massive, high-pressure, pervasively-fraudulent "cold-canvass" telephone sales campaign.^{15/}

1. "[T]he less you know about the business the better you will sell. Just read the script"

Most of Crown Colony's telephone solicitations were made from its Miami office, which Judge Weinfeld found to be a classic "boiler room"

^{14/} Other defendants in the court below were Martin Davidson, a salesman, who was also preliminarily enjoined by the district court (see Order of June 22, 1977, p. 2) but has not appealed; Samuel Pattera, a former salesman, who consented to the entry against him of a preliminary injunction, without admitting or denying the allegations in the complaint (consent of Samuel Pattera, June 6, 1977); and Ronald Yales, who was dismissed as a defendant at the outset of the hearing (Tr. 39).

^{15/} Crown Colony was registered with the Commission as a commodity trading advisor from April 7, 1976 through June 30, 1977. The firm was also registered with the Commission as a futures commission merchant, as required by Rule 32.3, 17 C.F.R. §32.3 (1977), from January 14, 1977 until December 31, 1977, when its registration expired without application for renewal having been made.

operation. 434 F. Supp. at 918.^{16/} It was housed in a building out of which wigs and chemicals were sold over long-distance telephone WATS lines (Tr. 266; Plaintiff's Ex. 13, p. 13). Crown Colony operated out of a vacant portion of the premises, employing the WATS lines mostly in the evenings (Tr. 283). Its offices contained approximately 50 telephones in small booths from which salesmen made their calls (Tr. 283-284). Mr. Alter was "in charge" of the office's overall operations, while Mr. Steiner was "manager of the room" (Tr. 311). Although Crown Colony's boiler room was located in Miami, Mr. Goldschmidt testified that the New York office kept in close contact with the Miami branch and that he and Mr. Tenney supervised its operational policies (Plaintiff's Ex. 13, p. 13). He further stated in a deposition introduced at the hearing:

"All recommendations on specific commodities originate, emanate in New York City, including the methods of selling."

(Ibid) (emphasis added).

In recruiting salesmen for its Miami office, Crown Colony did not seek persons experienced in commodities or commodity options but placed advertisements in local papers for "phone sales pros" or "WATS pros."

^{16/} A "boiler room" operation, as applied to the sale of securities, has been described in Securities and Exchange Commission v. R. J. Allen & Associates, Inc., 386 F.Supp. 866, 874 (S.D. Fla. 1974):

"Boiler room activity consists essentially of offering to customers securities of certain issuers in large volume by means of an intensive selling campaign through numerous salesmen by telephone or direct mail, without regard to the suitability to the needs of the customer, in such a manner as to induce a hasty decision to buy the security being offered without disclosure of the material facts about the [security]."

(Leckar Aff. Ex. A(1) and (2)). Mr. Steiner, who hired the salesmen, looked for two qualifications: phone sales experience and the desire to make "a lot of money" (Tr. 301). Training was virtually non-existent. It consisted of a 15 to 20 minute session designed (1) briefly to acquaint salesmen with the commodities industry and rudimentary commodities terminology, (2) to suggest methods by which Crown Colony's "credibility" could be demonstrated to customers, and (3) to introduce the new salesmen to the sales script in use at the time (Tr. 302-303).

Robert Shoher, a former Crown Colony supervisory salesman testified at the hearing that when he was hired he told Mr. Steiner he would get a "head start" at his new job by reading about London options over the weekend. Mr. Steiner replied (Tr. 292):

"Don't bother, the less you know about the business the better you will sell. Just read the script, do what your supervisor tells you. . . . You don't have to know anything about the business."^{17/}

Crown Colony effected its option sales through a "cold-canvass" telephone sales technique; that is, unsolicited sales calls were made to persons who had not previously expressed any interest in buying London options and with whom Crown Colony had had no previous contact. In fact, the names of potential customers were largely obtained from commercial customer lists purchased in bulk from other organizations (Leckar Aff. ¶26).

^{17/} Mr. Shoher became acquainted with Crown Colony because he serviced the vending machines in the building. Having overheard a sales pitch, and "since I was not having such good luck with the vending business," he asked Mr. Alter and Mr. Steiner for a job and was hired on the spot. (Tr. 286-291). He later became Crown Colony's "training director." (Tr. 301).

Crown Colony's Miami salesmen were placed under intense pressure to sell. Their telephone cubicles contained microphones that permitted their supervisors to monitor their conversations and speak with them without being overheard by customers (Tr. 283; Leckar Aff. ¶20). Messrs. Steiner and Alter emphasized to sales supervisors that they wanted the WATS lines constantly in use and did not want to see a "black light"--an unused phone. (Leckar Aff. ¶22). Crown Colony's employment ads "guaranteed" salesmen \$500 a week; according to Mr. Steiner, however, salesmen who did not generate this amount in commissions were in fact fired (Leckar Aff. ¶17).

Once a salesman made telephone contact, he would read to the potential customer--generally referred to as the "mooch" (Tr. 307)--from a canned sales script called a "front" (Tr. 293). These scripts were designed to do two things: stimulate the customer's interest in options by determining if he was "interested in making money," and ascertain if the customer had enough money to pay for an option, which ranged in price from \$2,900 to \$5,300 (Tr. 293, 297).^{18/} Accordingly, they varied little, regardless of the particular commodity option Crown Colony was offering at the time. Compare, Leckar Aff. Exs. B(1), B(8), B(10), and B(14). The customer affidavits submitted by the Commission attest to the uniformity of approach taken by Crown Colony. (See, e.g., Cunningham Aff. (sugar); Gergin Aff. (coffee); Staskal Aff. (rubber)).

These scripted presentations, as Judge Weinfeld found, 434 F. Supp. 916, state, or at least strongly suggest, that the customer was virtually certain to realize an extraordinary short-term return on his

^{18/} See Hordziejczuk Aff. ¶6; Cunningham Aff. ¶5.

investment. For example, a rubber option was represented to be "an opportunity to take \$4,100 and turn it into \$16,000 by the end of fall." (Leckar Aff. Ex. B(1)). The sales scripts typically closed with the statement that Crown Colony felt that the option "would be the best investment you ever made, you will judge it not by the check to us, but by the check we send to you, which will be a lot larger." (Tr. 295). (See Leckar Aff. Ex. B (15), (19)). Judge Weinfeld found that these statements were made without a reasonable belief in their accuracy, 434 F. Supp. at 916.

2. "Make sure that they have the money"

If the potential customer "qualified," he was "papered"--that is, if he appeared to have enough money to buy an option, he was mailed Crown Colony's sales literature (Tr. 296). That literature generally included a brochure purporting to explain the mechanics of options trading and other materials touting the particular commodity that the firm was then pushing. See, e.g., Exhibits attached to affidavits of Boitano, Baum (coffee); Tanner (sugar); Schertz (rubber). Salesmen were admonished not to send sales literature to persons who apparently lacked the money to buy an option. As Mr. Shoher testified (Tr. 296):

"We were told, Don't be wallpaperers, don't send paper out to unqualified people. Make sure that they have the money before you send them the paper."

Judge Weinfeld found that Crown Colony's sales literature "abounds in misleading, incomplete, and deceptive statements." 434 F. Supp. at 916. For instance, sales literature sent to customers states that Crown Colony was a member of the New York Mercantile Exchange (Leckar Aff. Ex. C(b)). In fact, only Mr. Goldschmidt was a

member, and his membership gave no privileges to Crown Colony (Leckar Aff. ¶30(a)). The literature represents that Mr. Goldschmidt was "Head of Research Department" at Argus Research (Tr. 222; Leckar Aff. Ex. C(b)), when in fact he was only employed there (Leckar Aff. ¶31(f)). It promises "Personalized Service by a Research Staff with many years of Analytical Experience" (Leckar Aff. Ex. C(b)). But the testimony and affidavits show that customers received only Crown Colony's highly standardized sales "recommendations," and that the firm in fact had no "Research Staff" except--on occasion--Mr. Goldschmidt (Leckar Aff. ¶31(f)). The sales literature states that "[i]f a 'call' option is purchased, the investor would realize a profit, if prices rose" (Leckar Aff. Ex. C(5)). In truth, to be profitable the price of a commodity would have had to change substantially beyond the price at which the option could be exercised--to offset the substantial premium charged by Crown Colony for the options. (Leckar, Aff. ¶30(c); Ex. D-F).

The sales brochure contains claims that the premium paid by the customer is a "one-time fee" that "represents the entire financial exposure to the investor." (Leckar Aff. Ex. C(5)). However, the premium was a "one-time fee" only if the customer abandoned his option; Crown Colony charged an additional commission when and if the option was exercised--a fact not disclosed to customers. See, e.g., Baum Aff. ¶31; Rodenburg Aff. ¶43 (Mr. Rodenburg was falsely told the fee resulted from "currency fluctuations"). The sales literature further states that investors in

"soft" (non-metal) commodities received

"protection from contracts written through and backed by the International Commodity Clearing House [in London] . . . which has capital and reserves in excess of \$50 million [and] guarantees due fulfillment of each contract registered under its regulations"

(Leckar Aff. Ex. C(6)). Those guarantees, however, extend only to member brokers of the London Exchange, and afford no direct protection either to Crown Colony--which was not an exchange member--or its customers. Leckar Aff. ¶30(d). The literature nowhere discloses the premiums or commissions charged by Crown Colony. See Exhibits to Boitano Aff.; Baum Aff.; Tanner Aff.).

3. "Build[ing] up greed" and "overcoming objections"

A week or so after the sales literature was sent, the salesmen would follow up by telephoning and reading a prospective customer another scripted sales pitch. This pitch, called a "drive" (Tr. 296), was intended to accomplish what Messrs. Steiner, Alter and others at Crown Colony described as "build[ing] up greed" in customers (Tr. 297-298), to facilitate the sale to them of commodity options. Salesmen could be extremely persistent: a farmer from Colton, Washington was called "about 25 times", sometimes late at night, in a period of three weeks before he finally purchased an option (Meyer Aff. ¶3). Robert H. Austin, an 82 year-old retired IBM executive, testified that he bought an option after a Crown Colony salesman "just wore me down" (Tr. 183). Customers were constantly urged to act quickly in order to get into the market before the "big price move" that was inevitably predicted. (See, e.g., Miller Aff. ¶7-8; Cunningham Aff. ¶5; Baum Aff. ¶7; Gergin Aff. ¶6.)

Other pressures to purchase options were exerted on hesitant customers in time-tested but none-too-subtle ways: customers who wanted to discuss the purchase with their wives were asked if they weren't "the head of the house" and capable of making their own decisions (Tr. 63, 304) or had their masculinity ridiculed (Rodenburg Aff. ¶8). Another customer who said he wanted to discuss the purchase with his banker and lawyer was told he "was old enough to make up . . . [his] own mind." (Heilskov Aff. ¶9). (See generally, Leckar Aff. ¶32.) Crown Colony personnel called these ploys "overcoming objections" (Tr. 303-304).

The "drives", however, went beyond mere high pressure tactics; they contained numerous false and misleading statements that Judge Weinfeld concluded were "intended to pressure customers into investing in options." 434 F. Supp. at 917. For example, customers were routinely told that every time a commodity increased in price over the strike-price--the price at which the option could be exercised--they would make a profit. See, e.g. Tr. 65, 432; Rodenburg Aff. ¶5; Gergin Aff. ¶7; Lewis Aff. ¶5; Hennessey Aff. ¶3. It was not until they sought to exercise an apparently profitable option that customers discovered that the price of the commodity had to move substantially beyond the strike price in order to cover the very large premiums Crown Colony charged. See Gergin Aff. ¶12.

The "drives", like the written promotional literature, also made repeated false claims that customer's options were guaranteed by

the International Commodity Clearing House (ICCH) in London. (See, e.g., Rodenburg Aff. ¶6; Apostolakos Aff. ¶9; Lewis Aff. ¶5; Leckar Aff. Ex. B(6) and (13)). Contrary to the impression conveyed by the firm's sales literature and scripted oral promotions, however, the customer's only protection was the financial responsibility of Crown Colony alone (Leckar Aff. ¶¶30(d), 39).

The "drives" represented to customers that "[a]s soon as we get notification of receipt of your funds, we will telex our man on the floor in London to get your strike price" (Leckar Aff. Ex. B(6), (13)). In fact, Crown Colony had no "man on the floor" and bought its options in bulk from its American broker (Leckar Aff. ¶31(c)).

The salesmen reading the scripted "drives" promised prospective customers that

"I'll be in constant touch with you and I want you to feel free to call me person to person collect anytime you desire no matter how trivial your questions may be."

(Leckar Aff. Ex. B(4), (7), (13)). Once they had purchased the options, however, customers often found it difficult or impossible to contact their salesmen (Tr. 67, 90). Telephone calls were not returned (Tr. 172; Miller Aff. ¶19), and salesmen who had promised to keep in touch and monitor accounts were never heard from again (e.g., Meyer Aff. ¶9; Miller Aff., ¶20).

Moreover, Crown Colony salesmen frequently departed from the scripts and made representations to potential customers that Judge

Weinfeld characterized as "even more egregious than those contained in the canned pitches." 434 F. Supp. at 917. Salesmen affirmatively promised profits to customers. Andres Hall, a retired seaman living on social security, testified that Mr. Davidson, a defendant below, told him that "we are guaranteeing that rubber will rise and it will rise tremendously. Our research department backs that up." (Tr. 430, 432).^{19/} The District Attorney for Napa County, California--who, when solicited, inquired about the chances of losing money--was told "that less than one percent of people lose money in commodity options and 99.999 percent or more of the investors made money" (Boitano Aff. ¶15; see also Hordzejcuk Aff. ¶4).

Crown Colony even solicited Roy W. Mauer, then the Securities Commissioner for the State of Texas, who tape-recorded some of his

^{19/} The "sales scripts" read to prospective customers represented that Crown Colony had spent "a lot of time doing our homework." (Leckar Aff. Ex. B(1), (8), (10), (14)). Testimony and numerous customer affidavits attest to the fact that the firm's salesmen often went beyond the scripts to tout the firm's "research department." (Tr. 66). One customer's salesman told him that "the man who did the research was so good that they paid him \$25,000 a week," only to be later told by another salesman that it was the research department that was paid \$25,000 weekly. (Meyer Aff. ¶¶4, 12). Another customer, solicited during the same period, was told that the "research department" was paid \$50,000 a month (Lewis Aff. ¶6). The Commission's investigation, however, found no specific allocation of money for research in Crown Colony's books. In fact, Mr. Goldschmidt himself did whatever research was done, and there was no research department (Leckar Aff. ¶31(f)). Crown Colony's rubber report, received by many customers, was excerpted, initially word-for-word, from a standard commodities yearbook. Compare Plaintiff's Ex. 1 with Plaintiff's Ex. 2; see also, Tr. 62, 99-100. Judge Weinfeld preliminarily enjoined the defendants from making further deceitful claims "regarding the knowledge, experience, and other expertise respecting commodity options transactions . . . as to any person employed by CROWN COLONY in any capacity." Order of June 30, 1977, ¶3(e).

conversations with the firm's salesmen and subsequently testified at the hearing. The recordings revealed that Mr. Mauer had been told that Crown Colony had never had a customer lose money (Plaintiff's Ex. 18, p. 8). The same representation was made to other customers by other salesmen, and by Mr. Steiner himself (Staskal Aff. ¶¶7, 11). Customers who tried to gauge the reliability of Crown Colony by asking how long the firm had been in business received wildly varying answers: 150-200 years (Staskal Aff. ¶8); 104 years (Zink Aff. p. 1); "quite awhile" (Cunningham Aff. ¶7); four years (Clark Aff. ¶4; "old time firm" (Doitano Aff. ¶10). In fact, of course, Crown Colony had only been formed in February 1976 (Tr. 418). Nor did Crown Colony management take steps to stop these and similar misrepresentations: Mr. Shoher, the former Crown Colony supervisory salesman, testified that he had brought similar misrepresentations to Mr. Steiner's attention, but was told to "forget about it, ignore it" (Tr. 346).

Equally significant as the defendants' affirmative misrepresentations are the facts that Crown Colony and its salesmen deliberately omitted to tell potential customers. Crown Colony marked-up the options it sold substantially over their cost to the firm on the London markets, yet customers were not told of this mark-up (see, e.g., Apostolokas Aff. ¶24; Rodenburg Aff. ¶15; Goodman Aff. ¶5). For example, copper options were apparently marked-up an average of about 45 percent while rubber options were marked-up, on average, about about 64 percent (Leckar Aff. Exs. D, F). Neither were customers

generally told of any commissions charged to them by Crown Colony.^{20/}
(Ibid.). Nor were customers informed of the effect of foreign currency fluctuations on value of their options (see, e.g., Hordzejcuk Aff. ¶13; Rodenberg Aff. ¶14; Lewis Aff. ¶5). One customer was falsely told that currency fluctuations could not affect the option "since the United States dollar was stronger than the pound sterling" (Hall Aff. ¶6).

4. "Load" and "Roll"—"Get the Mooch's Money"

Once a customer had purchased an option Crown Colony's main concern seems to have been to "load" or "roll" the customer into more options purchases. Frequently the firm sought to sell additional options on the basis that new option purchases could be used to recoup earlier losses (Tr. 349; Clark Aff. ¶9). As Mr. Shoher explained "loading" (Tr. 304-305):

"[O]nce you sold somebody an option you were to go back in to him, preferably at a propitious time if the market was moving up, but if not, it didn't matter. You could go in to him at any time. After selling him one you were to try to go in to the customer and sell as many more as you could"

The experience of numerous Crown Colony customers attests to the pervasiveness of this practice. (See, e.g., Tr. 119, Adelhelm Aff. ¶¶10, 17; Zink Aff. p. 2-3; Baum Aff. ¶10). Thus salesmen were exhorted (Tr. 307):

"Get the mooch's money; the mooch has your money in his pocket, make sure you get it; the mooch is taking \$400

20/

Customers who asked directly what commission Crown Colony charged received evasive answers (Staskal Aff. ¶10), or had the commission actively misrepresented--2 percent (Boitano Aff. ¶15); "pennies" (Janke Aff. ¶7). Mr. Goldschmidt himself told one customer that all he got from the sale of an option was "small commission" (Easley Aff. ¶14). In truth, Crown Colony salesmen were paid a 10 percent commission on their options sales (Tr. 289, 331).

out of your pocket; load the mooch any time you can, load him as often as you can."

"Rolling" consisted of exercising a customer's profitable option and reinvesting all or some of the proceeds in another option on a different commodity. As Mr. Shoher explained (Tr. 305):

"After you sold an option, when the option got into an equity position, after the client then earned back his premium and he was in a profit position, . . . computer printouts were received from our computer division, and it told us the following people were now in an equity position, and we were instructed to try to sell them, in this case out of coffee, and have them buy a sugar option. . . ."21/

This practice, too, was common (see, e.g., Gergin Aff. ¶17; Rodenburg Aff. ¶13; Walters Aff. ¶7). Mr. Steiner himself told salesmen when to try to "roll" customers (Tr. 306). What is more, old customers were urged to sell their coffee and purchase sugar options at very time Crown Colony was pitching coffee options to new prospects. Compare Rodenburg Aff. ¶11 with Tanner Aff. ¶2.

Where a customer did not agree to reinvest, Crown Colony frequently purchased or sold commodity options for the customer's account without his consent. For example, one customer testified about his unauthorized "roll" from coffee into sugar in February 1977 (Tr. 129):

"A Well, it appears that they sold some of the coffee options and some of them -- they sold them

21/ Not only did "rolling" generate extra commissions, but it also involved only bookkeeping money transfers, insuring payment. As Mr. Shoher explained (Tr. 305)

"we were told it was an immediate sale; we would be paid for it immediately because there was no transfer of money. We didn't have to have the customer wire the money in to us. It was already in our accounts so it was a bookkeeping transaction, and we got credit for it, and we made another sale and received another commission."

the major portion of the profit and put it into the sugar options.

"Q Was that done with your authority?

"A No. I didn't know what was going on on that. I thought I would get the money from the coffee and this was that. But they used a lot of that money from the coffee to buy more sugar options for me which I didn't necessarily want."

Other customers also had their options exercised without their authorization (Finklea Aff. ¶14; Baum Aff. ¶56). Mr. Hall, the retired seaman, testified that he had agreed to purchase a rubber option only if the strike price was no more than equivalent to 36 or 37 cents a pound (Tr. 433). Contrary to these instructions, the option was purchased at a strike price of 47.6 cents a pound (Tr. 349), but Mr. Hall's repeated efforts to rectify the matter were met with apparent indifference by Crown Colony (Tr. 446-447, 448, 450). Mr. Austin, the retired IBM executive, visited Crown Colony's New York office and personally directed Mr. Goldschmidt to liquidate a rubber option (Tr. 176), but Mr. Goldschmidt never did so (Tr. 177). Another customer's order to Mr. Goldschmidt to exercise his option also went unheeded (Apostolakos Aff. ¶23), and still more customers had similar difficulties (Baum Aff. ¶56; Goodman Aff. ¶11).

Judge Weinfeld concluded, 434 F. Supp. at 918:

"In sum, the evidence tendered to the Court--the substance of which has not been controverted by affidavits or testimony of the defendants--fully establishes that the defendants knowingly and purposefully conducted a 'boiler room' operation calculated to sell as large a volume of options as possible to customers throughout the United States without regard to the suitability of the investment for customers, the soundness of the investments themselves, or the accuracy and completeness of representations made to induce purchases. Each of the defendants promoted, aided, and abetted or participated in the operation of the 'boiler room.' There can be no doubt at this juncture that the Commission has shown a plethora of grave, willful violations of the Commodity Act and of the rules adopted under it."

ARGUMENT

As we have seen in the foregoing Counterstatement of Facts, all material findings made by Judge Weinfeld are fully supported either through the testimony of live witnesses, uncontroverted affidavits, or documentary evidence the authenticity of which has not been disputed. Thus, the appellants do not appear to contend that the facts found by Judge Weinfeld are clearly erroneous.^{22/} Nor do they dispute that these facts, as Judge Weinfeld held, are adequate to demonstrate that the appellants violated the antifraud provisions of Commission Regulation 32.9. Instead, the appellants claim primarily to have been denied a fair hearing (Crown Colony Br. at 6-15; Steiner and Alter Br. at 5-9) and that Judge Weinfeld abused his discretion in entering a preliminary injunction (Crown Colony Br. at 15-27; Steiner and Alter Br. at 9-10).

I. JUDGE WEINFELD WAS FULLY JUSTIFIED IN GRANTING
PRELIMINARY INJUNCTIVE RELIEF BASED UPON THE
UNCONTROVERTED EVIDENCE OF THE APPELLANTS'
REPEATED UNLAWFUL BEHAVIOR.

Under Section 6c of the Commodity Exchange Act, as amended, 7 U.S.C. §13a-1 (1976), the Commission has been empowered to bring an action in an appropriate district court seeking preliminarily and permanently to enjoin "any act or practice constituting a violation of the Act or any rule, regulation or order under that Act." That Section further provides: "Upon a proper showing a permanent or temporary injunction shall be issued without bond."

^{22/} Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part: "In all actions tried upon the facts without a jury . . . [f]indings of fact shall not be set aside unless clearly erroneous." The appellate court must be "left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum, 333 U.S. 364, 395 (1948); Heyman v. A.R. Winarick, Inc., 325 F.2d 584 (2d Cir. 1963).

The relief contemplated by Section 6c is a statutory injunction of a remedial or "prophylactic" nature designed to prevent injury to the public and to deter future illegal conduct.^{23/} As a result, the broad standards governing the issuance of an injunction under this provision are free from restrictive concepts applied in private litigation.^{24/} Thus, as this Court has observed, in order to demonstrate that it is entitled to injunctive relief, the Commission

"need not prove irreparable injury or the inadequacy of other remedies as required in private injunctive suits, but only that there is a reasonable likelihood that the wrong will be repeated."

Commodity Futures Trading Commission v. British American Commodity Options Corp., supra n. 24, 560 F.2d at 141.^{25/}

^{23/} Cf., e.g., Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 193 (1963); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

^{24/} See e.g., Commodity Futures Trading Commission v. British American Commodity Options Corp., 560 F.2d 135, 141 (2d Cir. 1977), petition for certiorari filed, 46 USLW 3487, (Sup. Ct., No. 77,199, December 27, 1977); Commodity Futures Trading Commission v. J. S. Love & Associates Options, Ltd., 422 F. Supp. 652, 661 (S.D.N.Y. 1976). Cf., Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971); Securities and Exchange Commission v. Capital Gains Research Bureau, 375 U.S. 180 (1963).

^{25/} Accord, e.g., Securities and Exchange Commission v. Management Dynamics, Inc., 515 F.2d 801, 808-809 (2d Cir. 1975); Securities and Exchange Commission v. World Radio Mission, Inc., 544 F.2d 535, 541 (1st Cir. 1976); Kelley v. Carr, CCH Comm. Fut. L. Rep. ¶20,517 (W.D. Mich. 1977); Commodity Futures Trading Commission v. J. S. Love & Associates Options, Ltd., supra, 422 F. Supp. at 661.

It is also well established that "[a] likelihood of future violations may be inferred from past unlawful conduct," see, e.g., Commodity Futures Trading Commission v. British American Commodity Options Corp., ^{26/} supra, 560 F.2d at 142, and that the mere cessation of illegal activity does not overcome this inference and deprive a district court of discretion to grant injunctive relief. See, e.g., United States v. Parke, Davis & Co., 362 U.S. 29, 47-48 (1960); Securities and Exchange Commission v. Universal Major Industries Corp., 546 F.2d 1044, 1048 (2d Cir. 1976); Securities and Exchange Commission v. Management Dynamics Inc., ^{27/} 515 F.2d 801, 807 (2d Cir. 1975).^{27/} Rather, as this Court has stated, the inference that future violation remains likely may be drawn by the district court in light of "the totality of the circumstances." Securities and Exchange Commission v. Management Dynamics Inc., supra, 515 F.2d at 807. Accord, e.g., United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953); Commodity Futures Trading Commission v. J. S. Love & Associates Options Ltd., 422 F. Supp. 652, 661 (S.D.N.Y. 1976). And

^{26/} Accord, e.g., Securities and Exchange Commission v. Management Dynamics Inc., supra, 515 F.2d at 801; Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972); Securities and Exchange Commission v. Keller, 323 F.2d 397, 402 (7th Cir. 1963).

^{27/} As this Court has observed, the injunctive provision of Section 6c "is in all material respects similar to §21(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(e), and §20(b) of the Securities Act of 1933, 15 U.S.C. §77t(b), and case law developed under those sections of the securities laws is pertinent to cases under . . . [Section 6c]."

Commodity Futures Trading Commission v. British American Commodity Options Corp., supra, 560 F.2d at 141, n. 11.

a lower court's determination that the public interest requires the imposition of a restraint should not be disturbed on appeal unless there has been a clear abuse of that discretion. See, e.g., Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972); Securities and Exchange Commission v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306-1307 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); Securities and Exchange Commission v. Culpepper, 270 F.2d 241, 250 (2d Cir. 1959).

Nevertheless, appellants argue that the injunction entered below was unjustified merely because Crown Colony claims to have ceased its fraudulent sales of commodity options before institution of the suit, and because all of the appellants, except Mr. Tenney, had submitted self-serving affidavits stating that they did not intend to re-enter the commodity options field. (See Crown Colony Br. at 24-25; Steiner and Alter Br. at pp. 9-10.) The record is clear, however, that Crown Colony did not cease its fraudulent activities until after it became aware of the Commission's investigation and after Commission counsel had advised the appellants' attorneys of the nature of the charges that would be brought. Thus, for example, Mr. Goldschmidt was personally deposed in the course of the investigation on March 29 and 30, 1977 (Tr. 101), more than seven weeks before Crown Colony purports to have ceased its operations. In addition, it was not disputed at the hearing before Judge Weinfeld that Commission counsel had met with counsel for the various appellants some six weeks earlier and had then "told them exactly what . . . [his] theory of the

case was and the kinds of evidence that . . . [he] had to support it" (Tr. 21). Numerous cases hold that cessation of unlawful activity only after the fact of an investigation is known is a factor tending to support an inference that future violations are likely. See, e.g., United States v. Parke, Davis & Co., supra, 362 U.S. at 48. Securities and Exchange Commission v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1100.^{28/}

It is evident, in any event, that Judge Weinfeld entered the preliminary injunction only after a thorough consideration of the "totality of the circumstances," including the appellants' disclaimer of future intent to return to the options business. In accordance with settled authorities, he stated, 434 F. Supp. at 919:

"The fact that the defendants for the moment may have ceased their activities is but one factor to be con-

^{28/} Judge Weinfeld apparently did not credit appellants' contention, repeated here (Crown Colony Br. at 24-25; Steiner and Alter Br. at p. 10), that Crown Colony's inability to comply with the Commission's segregation Rule 32.6, was the reason why Crown Colony had to cease the offer and sale of commodity options on May 19, 1977 (Aff. of Allen Goldschmidt, ¶¶3-4), and that this would defeat any inference of likely future violations by the firm or by the individual appellants. See 434 F. Supp. at 919, n. 30. Crown Colony was not a party to the action in which the Commission's enforcement of the segregation requirement was, for a time, enjoined. See British American Commodity Options Corp. v. Bagley, CCH Comm. Fut. L. Rep. ¶20,245 (S.D.N.Y. 1976), aff'd in part, rev'd in part, 552 F.2d 482 (2d Cir.), cert. denied, 98 S. Ct. 427 (1977). Thus, Crown Colony's failure to comply with the segregation requirement after December 27, 1976, the effective date of the segregation rule, could have been based only on the position that the Commission had announced on December 22, 1976, that it would take no enforcement action with respect to segregation by non-parties pending this Court's decision in that case. That no-action position, however, was withdrawn by the Commission on April 7, 1977, effective April 25, 1977, more than three weeks before Crown Colony claims to have ended its operations. See CFTC Advisory to Media, April 7, 1977. Accordingly, it may reasonably be doubted that there was any significant connection.

sidered in determining whether an injunction should issue, and it by no means compels denial of preliminary relief."

See, e.g., Securities and Exchange Commission v. Universal Major Industries Corp., supra, 546 F.2d at 1048; Securities and Exchange Commission v. Management Dynamics, Inc., supra, 515 F.2d at 807. Judge Weinfeld pointed out, id.:

"The defendants in this proceeding have engaged in myriad, recurrent violations of the Commodity Act and rules established thereunder. These violations were of the most serious nature, yet the defendants aware of what they were doing, pursued a crass and callous policy of indifference to the law, to the needs and circumstances of their customers and to the public interest in the area of commodity option trading."

He further emphasized, 434 F. Supp. at 919-920:

"Not a single defendant has come forward with testimony to challenge the substantive charges brought against him; nor has any defendant expressed regret for his past conduct or indicated a recognition of its gravity."

In these circumstances, Judge Weinfeld reasonably concluded, 434 F. Supp. at 920:

"The present plea of lack of purpose to commit future violations must yield to the fact of pervasive wrongdoing over an extended period. Their past actions speak louder than their present words."

It is significant, too, that the Commission's evidence went far beyond the prima facie case necessary to make a "proper showing" for a preliminary injunction under Section 6c. See Commodity Futures Trading Commission v. British American Commodity Options Corp., supra, 560 F.2d at 142. Cf., e.g., Securities and Exchange Commission v. Boren, 283 F.2d 312, 313 (2d Cir. 1960). Furthermore, as Judge Weinfeld observed, the Commission's proof did "not pose difficult questions of statutory interpretation," but rather involved "practices that lie at the core of the prohibitions contained in Rule 32.9." 434 F. Supp. at 914-915.

The operations of Crown Colony evidenced all "the evils inherent in 'boiler room' operations." Berko v. Securities and Exchange Commission, 316 F.2d 137, 139 (2d Cir. 1963).^{29/} Thus, as we have seen, supra pp. 10-13, Crown Colony employed inexperienced salesmen who were placed under extreme pressure to achieve a high volume of sales. Reading from prepared scripts, these salesmen lied to prospective customers concerning, for example, the guarantees underlying the options, the success of Crown Colony's past recommendations, and the effect of price movements in the underlying commodity on the investors' profits, and without any reasonable belief in the accuracy of what was said, purported to guarantee potential customers an extraordinary return on any investment they might be willing to make. 434 F. Supp. at 916.

Written materials distributed by Crown Colony were replete with "misleading, incomplete, and deceptive statements" and omissions, 434 F. Supp. at 916, including false statements of guarantees, lies concerning the firm's research facilities and the effect of commodity price changes on the profitability of an option, and material omissions with respect to applicable fees and substantial markups charged to customers. See supra pp. 14-16.

Crown Colony's closing scripts were also patently fraudulent. Not only were earlier misrepresentations repeated, but customers were subject-

^{29/} See also, United States v. Goldberg, 401 F.2d 644, 647 (2d Cir. 1968); Berko v. Securities and Exchange Commission, 297 F.2d 116, 117 (2d Cir. 1961); Securities and Exchange Commission v. R. J. Allen & Associates, 386 F. Supp. 866, 874 (S.D. Fla. 1974); Securities and Exchange Commission v. Charles A. Morris & Associates, 386 F. Supp. 1327, 1336 (W.D. Tenn. 1973).

ed to psychological pressures designed to prevent reasoned decision-making and to overcome any hesitancy a customer might have about purchasing an option. See supra pp. 16-17. When zealous salesmen went beyond the canned scripts--which was often--they frequently went so far as to claim that the firm's customers never lost money--which was patently untrue. Crown Colony also attempted to "load" customers with as many options as it could sell, and "rolled" customer's into new option positions, often without customer authorization or contrary to specific customer directives. See supra pp. 21-23.

In Kelley v. Carr, CCH Comm. Fut. L. Rep. ¶20,517 at p. 22,126, 22,134 (W.D. Mich. 1977), appeal pending, Nos. 78-9003, 78-9004, 78-9005 (6th Cir.), a case that Chief Judge Fox recognized to involve "a set of facts almost identical" to the facts at bar, it was held

"inherently fraudulent for an organization . . . to make bold predictions of astronomical returns on an investment in a field as speculative and uncertain as commodity options."

Moreover, it has been consistently recognized that persons recommending the purchase of a security must have an adequate factual basis for that recommendation. Franklin Savings Bank of New York v. Levy, 551 F.2d 521, 527 (2d Cir. 1977); Hanly v. Securities and Exchange Commission, 415 F.2d 589, 597 (2d Cir. 1969). The same principle should apply here. Furthermore, in Kelley v. Carr, supra, as well as in Commodity Futures Trading Commission v. J. S. Love & Associates Options, Ltd., supra, 422 F. Supp. at 655-656, numerous misrepresentations and material omissions substantially indistinguishable from those involved in the instant case were held to violate the Commission's antifraud

rule. In addition, this Court and the Court of Appeals for the Seventh Circuit have held that unauthorized trading constitutes fraud under Section 4b of the Commodity Exchange Act--the statutory provision upon which Rule 32.9 has been patterned.^{31/} See Haltmier v. Commodity Futures Trading Commission, 554 F.2d 556, 560 (2d Cir. 1977); Silverman v. Commodity Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977).^{32/}

Of course, similar principles have repeatedly been applied by this Court and other courts in finding that boiler room activities like those of Crown Colony violate antifraud provisions of the federal securities laws. See, e.g., United States v. Goldberg, 401 F.2d 644, 646-647 (2d Cir. 1968), cert. denied, 393 U.S. 1099 (1969); Vanasco v. Securities and Exchange Commission, 395 F.2d 349, 350-351 (2d Cir. 1969); Berko v. Securities and Exchange Commission, 316 F.2d 137, 139 (2d Cir. 1963); United States v. Roll-

^{31/} Judge Weinfeld found that Crown Colony's failure in some cases to execute trades ordered by customers also violated Rule 32.8(c), which makes it unlawful "unreasonably to fail to secure prompt execution of such order." 434 F. Supp. at 918 n. 23.

^{32/} The antifraud provision now contained in Rule 32.9 was patterned after the antifraud provision contained in Section 4b of the Commodity Exchange Act, 7 U.S.C. §6(b) (1976). The Commission explained that it did so in the expectation

"that the courts will adopt a consistent and uniform approach to the prevention of fraudulent and deceptive acts and practices under the Commodity Exchange Act."

40 Fed. Reg. 26504, 26505 (June 17, 1975). The Commission went on to observe:

"It is appropriate--particularly in light of the Commodity Futures Trading Commission Act of 1974--that all provisions of the Commodity Exchange Act, as amended, be broadly construed to effectuate their remedial purposes."

Id., n. 2.

nick, 91 F.2d 911, 915 (2d Cir. 1937); Securities and Exchange Commission v. R.J. Allen & Associates Inc., 386 F. Supp. 866, 874 (S.D. Fla. 1974); Securities and Exchange Commission v. Charles A. Morris & Associates, Inc., 386 F. Supp. 1327, 1336 (W.D. Tenn. 1973).

The appellants advance a list of factors that they contend the district court was required to consider in determining whether to issue a preliminary injunction (Crown Colony Br. at 22-26).

As we have seen, however, two of the factors cited by appellants--the seriousness of their past violations and the likelihood of repetition (id. at 24-25)--were unambiguously considered by Judge Weinfeld and were emphatically resolved in the Commission's favor. See supra p. 29. Moreover, in Commodity Futures Trading Commission v. British American Commodity Options Corp., supra, 560 F.2d at 143, this Court has already resolved as a matter of law the manner in which a district court must consider the "interest sought to be protected by the statute." (Crown Colony Br. at 23-24):

"Where the Commission is seeking to vindicate the public interest, the need to enforce the commodity trading laws must be given 'special emphasis in the district court's calculus,' Management Dynamics, supra, 515 F. 2d at 809 n. 5."

There can be no doubt that a primary reason why the Commission was granted jurisdiction to regulate commodity option trading was to protect the public from fraud. See supra pp. 7-9. Judge Weinfeld expressly recognized that the Commission's option antifraud Rule 17 C.F.R. §32.9 was intended, among other things, to prohibit fraudulent activities of the very kind conducted by Crown Colony. See 434 F. Supp. at 914-915.

In British American this Court also touched significantly upon a proper weighing of the danger that would result if an injunction should not issue against the hardship a defendant might suffer from an injunction wrongfully issued (Crown Colony Br. at 24-25). It stated, 560 F.2d at 143, that "a finding that future violations are likely to occur implies that a significant injury to the public has been shown," and reiterated the often cited principle that "the public interest, when in conflict with private interest, is paramount." SEC v. Culpepper, 270 F.2d 241, 250 (2d Cir. 1958).

The appellants' further contention that "the Commission did not plead and the court did not find materiality" (Crown Colony Br. at 23) is frivolous on the face of the instant record. The false and misleading statements and omissions that were an inherent part of the appellants' boiler room operation were necessarily designed to influence a prospective customer to buy the commodity options being offered. The proof is substantial that these fraudulent efforts all too often succeeded; when they did not succeed it was not for the appellants' lack of trying. Nor was the Commission required to prove, as appellants suggest (Crown Colony Br. at 23), that any prospective customer to whom fraudulent acts were directed in fact relied upon the fraud to his detriment. "[R]eliance is not an element of fraudulent misrepresentation" in a context of this kind. Cf., e.g., Securities and Exchange Commission v. North American Research and Development Corp., 424 F.2d 63, 84 (2d Cir. 1970); Hanly v. Securities and Exchange Commission, supra, 485 F.2d at 596. See also Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., supra, 375 U.S. at 192-193.

Appellants further suggest that a delay by the Commission in bringing an enforcement action may somehow defeat its entitlement to the injunctive relief (Crown Colony Br. at 26). But even if an unusual delay had occurred here--which is not the case--no act or omission by the Commission can absolve the appellants of their responsibility for their past unlawful behavior or be relied upon as a basis why the public should be denied the protection to which it is entitled and that injunctive relief will provide. Thus, this Court has recognized that an administrative agency may not waive the requirements of an act of Congress nor may the doctrine of estoppel be successfully asserted to defeat a prayer for injunctive relief. See, e.g., Securities and Exchange Commission v. Culpepper, supra, 270 F.2d at 248.

Finally, appellants contend (Crown Colony Br. at 16-17, 22), in light of Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), that "scienter" or "willfulness" must be found to be an element of violation of the Commission's antifraud rule. They assert (Crown Colony Br. at 22) that the court below "made no finding specifically with respect to the presence or absence of scienter." To the contrary, however, Judge Weinfeld found "a plethora of grave, willful violations," 434 F.2d at 918 (emphasis added), after having observed that "the defendants purposefully engaged in the sort of continuous, concerted fraudulent practices that lie at the core of the prohibitions contained in Rule 32.9." Id. at 914-915 (emphasis added). And he expressly held, as we have seen supra p. 23, that the defendants

"knowingly and purposefully conducted a 'boiler room' operation calculated to sell as large a volume of options as possible to customers throughout the United States without regard to the suitability of the investment for customers, the soundness of

the investments themselves, or the accuracy and completeness of representations made to induce purchases."

Id. at 918 (emphasis added).

Even had these findings not been made, however, the principle enunciated in Ernst & Ernst has no application to the case at bar. In that case the Supreme Court held that the words "manipulative or deceptive," when used in conjunction with "device or contrivance" in Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), was intended to authorize the Securities and Exchange Commission to adopt only antifraud rules prohibiting "knowing or intentional misconduct." 425 U.S. at 197. Unlike the SEC's authority under Section 10(b), however, the rulemaking authority of the Commodity Futures Trading Commission under Sections 4c(b) and 8a(5) of the Commodity Exchange Act, 7 U.S.C. §§6c(b) and 12a(5) (1976), contains no similarly limiting language. Indeed, this Court has recognized that option trading may completely be banned by the Commission under these broad provisions. British American Commodity Options Corp. v. Bagley, supra, 552 F.2d at 490. Thus, the Commission was free to adopt--and did adopt--a rule the violation of which does not require any element of willfulness.^{33/} See Commodity Futures Trading Commission v. J. S. Love & Associates Options, Ltd., supra, 422 F. Supp at 659-660.

^{33/} While Rule 32.9 is generally patterned after Section 4b of the Commodity Exchange Act, the Commission deliberately omitted from the rule the word "willfully" which qualifies several of the operational provisions of the statutory language otherwise incorporated into the rule. The Commission explained that it was deleting the willfulness language to avoid the restrictive reading given Section 4b's willfulness requirement by some courts. 41 Fed. Reg. 26504, 26505 n. 2.

- II. JUDGE WEINFELD WAS ENTIRELY JUSTIFIED IN DENYING APPELLANTS' MOTION FOR A CONTINUANCE OF THE PRELIMINARY INJUNCTION HEARING AND IN REFUSING TO CREDIT THE CLAIM OF MR. TENNEY'S COUNSEL THAT HIS CLIENT HAD NOT RECEIVED ADEQUATE NOTICE OF THE HEARING.

On the day that the preliminary injunction hearing began, the appellants sought a continuance, claiming that additional time was needed to prepare. They now assert that Judge Weinfeld's denial of their motion was erroneous (Tr. 29; Crown Colony Br. at 6-15; Steiner & Alter Br. at 5-9). But a motion for a continuance of a proceeding is addressed to the discretion of the trial judge. Unless an abuse of that discretion is shown, the grant or denial of a motion for a continuance will not be disturbed by an appellate court. E.g., Michelson v. Moore-McCormack Lines, Inc., 429 F.2d 394, 395 (2d Cir. 1969); United States v. Ellenbogen, 365 F.2d 982, 985 (2d Cir. 1966), cert. denied, 386 U.S. 923 (1967).^{34/} Since the district court's discretion is to be exercised in light of the factual circumstances of the particular case, no abuse of discretion can be shown here; the appellants had a fair and sufficient opportunity to prepare and defend against the evidence adduced by the Commission in support of its motion for a preliminary injunction.^{35/}

^{34/} In Ehrlichman v. Sirica, 419 U.S. 1310 (1974), upon which appellants rely (Crown Colony Br. at 14), Chief Justice Burger, sitting as Circuit Justice, refused to stay a district court order establishing a date for commencement of a trial. Notwithstanding what the appellants imply (id.), nowhere does that opinion state or intimate that it is not necessary to find an abuse of discretion to reverse a trial court's refusal to grant a continuance; instead it states, to the contrary, "[s]uch matters are essentially within the sound discretion of the trial judge" Id. at 1311.

^{35/} Appellants' argument that Judge Weinfeld's decision on their motion denied them due process (Crown Colony Br. at 6-15; Steiner and Alter

It was undisputed before Judge Weinfeld--and remains undisputed before this Court--that counsel for all appellants had been made aware of the Commission's intent to bring the instant action approximately six weeks before this action was actually filed (Tr. 21). As Judge Weinfeld was informed, Commission counsel met at that early date with attorneys representing Crown Colony and Messrs. Goldschmidt, Tenney, Alter, and Steiner and explained the theory of the Commission's case and the nature of the evidence that would be presented to support it (Tr. 21). In the week prior to the week the complaint was filed Crown Colony retained its present counsel. Before the institution of this action, however, Commission counsel twice discussed with Crown Colony's new attorneys the same matters that had earlier been disclosed--first in a two-to-three hour telephone conversation (Tr. 23) and then in person (Tr. 22, 24).

On Wednesday, June 1, 1977, the day after the Commission filed its complaint, Commission counsel provided all appellants' attorneys with copies of the Commission's complaint and copies of the affidavits supporting

35/ (Footnote continued)

Br. at 5-9) appears based upon a misunderstanding of the nature of a preliminary injunction. A preliminary injunction is not a final adjudication on the merits of a cause, but rather provides only interim relief. E.g., Diversified Mortgage Investors v. United States Life Title Insurance Co. of New York, 544 F.2d 571, 576 (2d Cir. 1976); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953). Both the legal conclusions and factual determinations reached by a court on a motion for preliminary relief are therefore "subject to change after full hearing and the opportunity for more mature deliberations." Hamilton Watch Co., supra, 206 F.2d at 742. Of course, the party opposing a preliminary injunction must be provided with a fair opportunity to defend, including--if there are disputed facts or issues of credibility--an evidentiary hearing in most instances. See, e.g., Forts v. Ward, 566 F.2d 849, 857 (2d Cir. 1977); Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2d Cir. 1972); Securities and Exchange Commission v. Frank, 388 F.2d 486, 490-491 (2d Cir. 1968).

the Commission's motions for relief (Tr. 24, 27). On Friday, June 3, 1977, the day after Judge Weinfeld had scheduled a preliminary injunction hearing for June 6, Commission counsel furnished all defense counsel with the names of the customer witnesses he intended to call at the hearing (Tr. 22). Over the weekend--on June 4 or 5--he further supplied appellants' counsel with the names of the Crown Colony account executives he expected to call (Tr. 23).

Without denying that the names of all six customer witnesses had earlier been provided, and without candidly disclosing that but a single additional witness was ultimately called to testify, appellants now argue, among other things, that the Commission had not served its "complete" list of witnesses until after the defendants had returned from Florida, where they had gone over the weekend. Thus, they seemingly ask this Court inaccurately to infer that they were materially deprived of the use of business records, located in Florida, that pertained to the witnesses (Crown Colony Br. at 12-13; Cf. Steiner and Alter Br. at 4).

It appears, however, that the business records to which they refer relate only to the six customer witnesses whose identities had been disclosed the previous Friday. Moreover, before their trip to Florida, defense counsel had also received affidavits executed by four of these witnesses, and Commission counsel had provided defense counsel with a tape recording made by fifth customer witness, the Texas Securities Commissioner (Tr. 29). Accordingly, had counsel wished to prepare and present a defense with respect to those witnesses and the evidence they would adduce, they had a full opportunity, while in Florida, to review whatever relevant records Crown Colony may have maintained and to bring those records back to New

York upon their return.^{36/} In any event, the hearing in New York lasted for three days and the defendants extensively cross-examined the Commission's witnesses;^{37/} during that entire period such records as may exist concerning any of the six customer witnesses, if considered essential to the defense, were never more than a few hours away.^{38/}

Defendants further claim that they had not been provided enough time to "locate and subpoena" other Crown Colony employees to impeach Robert Shoher, the former Crown Colony salesman who also testified at the hearing (Crown Colony Br. at 13). But, Mr. Shoher was subjected to

^{36/} That those records might have revealed that some of those customers made money, rather than lost money, on Crown Colony's options is irrelevant to the fact of the firm's fraudulent activities. (See Crown Colony Br. at 13). Hughes v. Securities and Exchange Commission, 174 F.2d 969, 974 (D.C. Cir. 1949). On the other hand, the credibility of any customer witness who may have made money would have been enhanced, since that fact would belie any claim that the witness might have had a grudge against appellants because of monies lost (Crown Colony Br. at 13).

^{37/} The defendants' cross examination of Commission witnesses comprises 253 of the 449 transcript pages relating to the presentation of the Commission's case.

^{38/} In contrast to the instant case, in Marshall Durbin Farms, Inc. v. National Farmers Organization, 466 F.2d 353 (5th Cir. 1971), upon which Crown Colony relies (Br. at 10-11), plaintiffs had supported a motion for preliminary relief with 77 affidavits, including 68 filed the day of the hearing. 446 F.2d at 355. The defense had been allowed only an hour to study the affidavits, including 68 filed the day of the hearing. 446 F.2d at 355. The defense had been allowed only an hour to study the affidavits, and oral testimony for both parties was limited by the court to a part of that day, with only an hour and 45 minutes for the defendants. Ibid. The affidavits, moreover, involved parties and incidents not revealed to defendants until the day of the hearing. It was these extreme factors, among others, that led the appellate court to conclude that defendants had been given inadequate time to prepare to defend the preliminary injunction motion.

extensive cross-examination (Tr. 312-395, 397-400). In addition, the appellants in fact called a witness who testified in an attempt to impeach Mr. Shoher's testimony; the evidence he offered, however, was unpersuasive (see Tr. 490-498, 506). Moreover, the defendants themselves might have taken the stand to controvert Mr. Shoher's testimony; their silence on this and all other matters proves too much.^{39/} In these circumstances, particularly since Mr. Shoher's testimony is consistent with the entire body of evidence otherwise adduced by the Commission, it is speculative, at best, whether, as appellants claim, they could ever have shown "distortion and bias" on Mr. Shoher's part (Crown Colony Br. at 13).

Appellants' counsel informed the court on June 7, 1977--after two days of hearings--that they intended to put on two days of defense testimony (Tr. 507). On June 8, however, they elected to rest their case after calling but a single witness (Tr. 506). Appellants now assert that their decision to withhold their defense was based upon their concern that Judge Weinfeld might have consolidated a trial on the merits of the Commission's complaint with the hearing on the Commission's motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a) (Crown Colony Br. at 13; Steiner and Alter Br. at 8).

Of course, the basic premise of this argument, that appellants made a conscious judgment to withhold a defense already planned if not fully prepared, is inconsistent with their claim (supra, p. 36) that they had not had time adequately to prepare their defense, and suggests the insincerity

^{39/} Messrs. Goldschmidt, Alter and Steiner confined their participation in their own defense to affidavits containing their disclaimers of future intent to continue in the commodity option business.

of one contention or the other. In any event, the appellants professed concern about a consolidation has no reasonable basis in the record. In the first place, Judge Weinfeld had made clear on June 2 (Tr. 4), when he considered the Commission's application for a temporary restraining order, that he would not consolidate the preliminary hearing with a trial on the merits if the defendants had a need for discovery. Thereafter, at the outset of the preliminary injunction hearing, "in view of the representations made by counsel that they need further time to prepare on the case proper," (Tr. 35), Judge Weinfeld stated that

"[a]t this juncture of the proceeding, all I am considering, and I am prepared to consider, is a motion for preliminary injunction"

To be sure, Judge Weinfeld indicated (id.) that if the appellants appeared

"in a position to present whatever evidence is available . . . I will at that time reconsider whether or not there should be a consolidation."

He immediately reemphasized, however (id.): "All I am hearing now is a motion for a preliminary injunction."

Although, as we have seen, supra, pp. 37-38, Mr. Tenney, by counsel had been fully advised long in advance of this lawsuit concerning the nature of the claims to be made against him, and his attorney had appeared in his behalf at the hearing and had fully participated therein, Mr. Tenney argues (Crown Colony Br. at 28-30) that he was not given adequate notice of the hearing, apparently on the basis that he had not yet been served with process before the hearing commenced. This contention, however, reflects a misunderstanding of the distinction between service of the summons and complaint, which is effected upon a defendant pursuant to Rule 4, Fed. R.

Civ. P., and notice respecting a hearing on a request for injunction, which is required by Rule 65(a)(1), Fed. R. Civ. P.^{40/}

As to the latter, notice may be accomplished by timely notification given to an attorney for a party. See Rule 5, Fed. R. Civ. P. Here, Mr. Tenney did not contest in the district court--nor does he argue before this Court--that his attorney failed to receive timely notice of the June 6 preliminary hearing consistent with the requirements of Rule 6(d). In fact, on June 2, 1977, when counsel for Mr. Tenney appeared before Judge Weinfeld to defend against the Commission's application for a temporary restraining order, he was expressly notified by the district court that a hearing on the Commission's motion for preliminary injunction would be held on June 6. As a result, counsel appeared and represented Mr. Tenney's interests at that hearing. And the record indicates that counsel had spoken with his client concerning the pending proceedings before undertaking to represent him (See June 2 Tr. at 3.)

III. THE AVERMENTS OF FRAUD IN THE COMPLAINT ARE
PLEADED WITH THE REQUISITE PARTICULARITY.

While not challenging the sufficiency of the evidence of fraud

^{40/} Although the record is not clear whether Mr. Tenney received service of process prior to the entry of the amended order of preliminary injunction on June 30, 1977, proof of proper mailing, pursuant to Rule 4i(D), Fed. R. Civ. P. was presented to the court below (Tr. 33, 35-36). His attorney, while raising the question of proper service of process before the district court (June 2 Tr. at 3; June 6 Tr. at 12-16), never moved for a dismissal of the action on that basis. And Mr. Tenney's answer, dated June 28, 1977--two days before the order appealed from was entered--asserts no defense of lack of jurisdiction over his person or insufficiency of service of process. In these circumstances, pursuant to Rule 12(h) of the Federal Rules of Civil Procedure, any defense he might have raised on either of those bases has been waived.

against them, appellants Crown Colony, Goldschmidt and Tenney assert (Crown Colony Br. at 30-31) that the absence from the Commission's complaint of the names of specific complainants, and detailed information regarding their individual transactions, violates Rule 9(b), Fed. R. Civ. P., which provides in pertinent part:

"In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity."

But compliance with this rule does not require that evidence be pleaded in the complaint. Schlick v. Penn-Dixie Cement Corporation, 507 F.2d 374, 379 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975). Thus, the appellants' argument ignores the purpose of Rule 9(b), which is to assure that defendants receive adequate notice of the acts constituting the alleged fraud so that an intelligent response to the pleadings can be made. See, e.g., Felton v. Walston and Co., Inc., 508 F.2d 577 (2d Cir. 1974).^{41/} The requirements of Rule 9(b) must be read in conjunction with, and not in derogation of, the provision of Rule 8, Fed. R. Civ. P., that pleadings should contain a "short and plain statement of the claim or defense." Schlick v. Penn-Dixie Cement Corp., supra, 507 F.2d at 379. Thus, where the fraud alleged encompasses, as in the present action, numerous acts or transactions over an extended period of time, details as to the time and place of every fraudulent act or transaction need not be averred in the complaint to comply with Rule 9(b), since to do so would

^{41/} Accord, e.g., Walling v. Beverly Enterprises, 476 F.2d 393 (9th Cir. 1973); Kamens v. Horizon Corp., 432 F. Supp. 322 (S.D.N.Y. 1977); Gross v. Diversified Mortgage Investors, 431 F. Supp. 1080 (S.D.N.Y. 1977); Rich v. Touche Ross & Co., 68 F.R.D. 243 (S.D.N.Y. 1975).

unduly lengthen the complaint in violation of Rule 8(a), particularly where evidentiary material would have to be averred. Paramount Film Distributing Corp. v. Jaffurs, 11 F.R.D. 437 (W.D. Pa., 1951); Loew's Inc. v. Makinson, 10 F.R.D. 36, 37 (N.D. Ohio, 1950).

The Commission's complaint fully complies with the requirements of Rules 8 and 9(b). The first count (§§13-15) alleges a continuing course of conduct by all defendants, begun in March 1976 and calculated, inter alia, to cheat, defraud and deceive purchasers and prospective purchasers." The complaint (§14(a)-(e)) further outlines the means by which appellants organized their operation effectively to perpetrate their fraudulent scheme.

Thereafter, the complaint (§14(f)-(j); §15) describes in detail specific misrepresentations and omissions of material fact made in furtherance of the unlawful scheme, including, among other things, instructing salespersons to conceal from customers the markup paid by Crown Colony for options (§14(g)(i)), making profit predictions for which there is no basis in fact (§14(h)(i)), and stating that the options purchased through Crown Colony are guaranteed, when, in fact, no such guarantees run to Crown Colony customers (§14(j)(iv)).^{42/} These detailed averments are more than sufficient to comply with Rule 9(b).^{43/}

^{42/} Moreover, on the day after the complaint was filed, and prior to the hearing on the TRO on June 2, 1977, the appellants' counsel received affidavits of 24 of the appellants' customers which provided the names of the salesmen involved and more detailed information concerning the particular transactions referred to in the complaint (Tr. 22, 24).

^{43/} Count II of the complaint incorporates by reference the averments of Count I. Count III, without pleading evidence, describes in adequate detail the conduct which violates Rule 32.8 of the Commission's regulations, supra n. 31.

CONCLUSION

For the foregoing reasons, the judgment of the district court entered on June 30, 1977, should be affirmed.

Respectfully submitted,

John G. Gaine
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Richard E. Nathan
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Richard A. Levie
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Thomas B. Goodbody
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Commodity Futures Trading Commission
2033 K Street, N. W.
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March 3, 1978



COMMODITY FUTURES TRADING COMMISSION

2033 K Street, N.W., Washington, D.C. 20581

OFFICE OF
THE GENERAL COUNSEL

March 3, 1978

A. Daniel Fusaro, Clerk
U.S. Court of Appeals
for the Second Circuit
U.S. Courthouse
Foley Square
New York, New York 10007

Re: Commodity Futures Trading Commission v.
Crown Colony Commodity Options, Ltd., et al.
77-6134; 77-6136

Dear Mr. Fusaro:

Enclosed for filing with the Court in the above-referenced case are an original and ten copies of the BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, APPELLEE.

I hereby certify that on March 3, 1978, I caused to be served by United States mail, first class, postage prepaid, a true copy of the BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, APPELLEE, upon counsel for appellants as follows:

Martin Kaplan, Esquire
Gusrae, Green & Kaplan
67 Wall Street
New York, New York 10005

Allen Reed, Esquire
Levine, Reckson & Reed
3501 Biscayne Boulevard
Miami, Florida 33137

Very truly yours,

Thomas B. Goodbody
Attorney

Encs.



P/S

COMMODITY FUTURES TRADING COMMISSION

2033 K Street, N.W., Washington, D.C. 20581

OFFICE OF
THE GENERAL COUNSEL

March 10, 1978

A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Commodity Futures Trading Commission v.
Crown Colony Commodity Options, Ltd., et al.
Nos. 77-6134, 77-6136 (2d Cir.)

Dear Mr. Fusaro:

It is our understanding from personnel in your office that the Court has not yet received copies of the BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, APPELLEE, which I mailed to the Court for filing on March 3, 1978. Accordingly, I am enclosing for filing with the Court ten additional copies of our brief.

I hereby certify that on March 3, 1978, I sent by United States mail, postage prepaid, eleven copies of the BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, APPELLEE to the Court, and caused to be served upon counsel for appellants two copies of the BRIEF, as reflected by the attached copy of my certificate of service, dated March 3, 1978.

Very truly yours,

Thomas B. Goodbody
Attorney

Enclosures (10)

cc: Martin Kaplan, Esq.
Allen Reed, Esq.



COMMODITY FUTURES TRADING COMMISSION
2033 K Street, N.W., Washington, D.C. 20581

OFFICE OF
THE GENERAL COUNSEL

March 3, 1978

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for the Second Circuit
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Foley Square
New York, New York 10007

Re: Commodity Futures Trading Commission v.
Crown Colony Commodity Options, Ltd., et al.
77-6134; 77-6136

Dear Mr. Fusaro:

Enclosed for filing with the Court in the above-referenced case are an original and ten copies of the BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, APPELLEE.

I hereby certify that on March 3, 1978, I caused to be served by United States mail, first class, postage prepaid, a true copy of the BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, APPELLEE, upon counsel for appellants as follows:

Martin Kaplan, Esquire
Gusrae, Green & Kaplan
67 Wall Street
New York, New York 10005

Allen Reed, Esquire
Levine, Reckson & Reed
3501 Biscayne Boulevard
Miami, Florida 33137

Very truly yours,

A handwritten signature in dark ink, appearing to read "Thomas B. Goodbody", is written over the typed name.

Thomas B. Goodbody
Attorney

Encs.